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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 767

INTERSTATE COMMERCE COMMISSION AND HUDSON & MANHATTAN RAILROAD COMPANY, APPELLANTS

v.

CITY OF JERSEY CITY AND FRED M. VINSON, ECONOMIC STABILIZATION DIRECTOR, BY CHESTER BOWLES, PRICE ADMINISTRATOR, APPELLEES

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY

BRIEF FOR APPELLANT, INTERSTATE COMMERCE COMMISSION

OPINIONS BELOW

The opinion of the District Court (R. 194) is unreported. The two reports of the Commission which have been enjoined by the lower court are its reports of June 8, 1943, 255 I. C. C. 649 (R. 248) and November 2, 1943, 256 I. C. C. 507 (R. 272) in I. & S. Docket No. 4394, *Passenger Fares of Hudson & Manhattan R. Co.* Other Commission reports involved are its decisions in

the same proceeding dated July 11, 1938,[1] 227 I. C. C. 741 (R. 286), and August 3, 1943, 256 I. C. C. 269 (R. 313).

JURISDICTION

The final decree of the District Court was entered on January 14, 1944 (R. 218). Petition for appeal was filed February 9, 1944 (R. 220), and was allowed the same day (R. 234). Probable jurisdiction was noted on April 3, 1944 (R. 433). Jurisdiction is conferred by section 5 of the Commerce Court Act, c. 309, 36 Stat. 539, 543, 28 U. S. C., section 45a; section 238 of the Judicial Code as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, 938, par. (4), 28 U. S. C., section 345, and the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 208, 219–221, 28 U. S. C., sections 45, 47a.

STATUTES INVOLVED

Pertinent provisions of the statutes involved are set forth in the Appendix, infra, pp. 63–70.

QUESTIONS PRESENTED

1. In allowing the Hudson & Manhattan Railroad Company to meet increased costs by granting an increase in passenger fares on its downtown line from 8 cents to 9 cents, and subsequently to $9\frac{1}{11}$ cents (11 tokens for a dollar) or 10 cents

[1] Sustained by this Court in *Hudson & Manhattan R. Co.* v. *United States*, 318 U. S. 98.

in cash for the passenger preferring to proffer a single fare, which increase was accompanied by a decrease from 10 cents cash to $9\frac{1}{11}$ cents (11 tokens for a dollar) or 10 cents in cash for operations on the uptown line of the carrier, did the Commission, in the absence of any offer of evidence to show the inflationary effect of such modest increase, give proper weight to the provisions of the Emergency Price Control Act of 1942 (Act Jan. 30, 1942, Title 50, U. S. C., Secs. 901 et seq.), and the Inflation Control Act (Stabilization Act) of 1942 (Act October 2, 1942, Title 50, U. S. C., Secs. 961 et seq.)?

2. Where the Commission, after full hearing and based upon substantial evidence, granted an increase in passenger fares from 8 cents to 9 cents, sought by the Hudson & Manhattan Railroad Company, and where it was subsequently shown that the company, due to limitations in the mechanism of its fare collection boxes, was unable to collect this increased fare consisting of five coins, could the Commission, in reopening the proceeding, limit the rehearing to evidence concerning the alleged disabilities of the fare collection boxes, or was it necessary for the Commission to reopen the entire case and consider anew the propriety of the increase?

3. Was the Commission's order of June 8, 1943, permitting an increase in the passenger fares of the Hudson & Manhattan from 8 cents to 9 cents, and

its order of November 2, 1943, permitting, after further hearings, a modification in its prior order so as to allow the carrier to charge 11 token for a dollar, applicable on both its uptown and downtown lines (or 10 cents cash for the "occasional" passenger) supported by substantial evidence?

STATEMENT

In I. & S. Docket No. 4394, *Passenger Fares of Hudson & Manhattan Railroad Company*, 227 I. C. C. 741, decided July 11, 1938, the Commission permitted that carrier to increase its passenger fares between Hudson Terminal and stations in Jersey City and Hoboken, known as its downtown line, from 6 cents to 8 cents.[2] This order was sustained by this court in *Hudson & Manhattan R. Co.* v. *United States*, 313 U. S. 98. The report in that case, also in the record here (R. 286) contains a description of the properties of the Hudson & Manhattan, briefly referred to as follows:

Appellant's lines consist of an underground rapid-transit system, operated by electric power of the three-rail type, transporting passengers between stations on Manhattan Island [3] and stations in Jersey City and Hoboken (R. 287). It does not

[2] A map of appellant's properties appears at p. 12 of this brief.

[3] Appellant's properties are also described in a case arising under the Railway Labor Act, reported in *Hudson & Manhattan R. Co.* v. *Cahill*, 22 F. Supp. 105, reversed 103 F. (2d) 327, certiorari denied, 307 U. S. 640.

handle package, freight, or express matter (R. 287). It has two double-track lines under the Hudson River, known as the downtown and uptown lines, connecting on the New Jersey side and comprising in all about 8.5 miles of line, of which all but 0.63 mile is underground (R. 287).

The downtown line,[4] which crosses under the river by two parallel tunnels between Exchange Place, Jersey City, and Hudson Terminal, New York, extends westwardly in Jersey City from Exchange Place through a station at Grove and Henderson Streets to Journal Square, where connection is made with the Pennsylvania Railroad (R. 287).

The uptown line[4] crosses under the Hudson River by two parallel tunnels from Hoboken to Christopher Street, New York, from which point it runs uptown under Sixth Avenue to a terminal at Thirty-Third Street (R. 287). The uptown and downtown lines connect on the New Jersey side by means of a north-and-south line paralleling the Hudson River, extending from a junction with the uptown line near Hoboken (R. 287). Appellant has stations in the terminals of the D. L. & W. R. R. Co. at Hoboken, the Erie R. R. at Jersey City, and the

[4] The Commission had in 1920 permitted an increase from 7 cents to 10 cents for interstate transportation on the uptown line. At the same time the interstate fare on the downtown line had been increased from 5 to 6 cents (*Local Fares on Hudson & Manhattan R. R.*, 58 I. C. C. 270).

Pennsylvania Railroad at Exchange Place (R. 287–8). In conjunction with the Pennsylvania Railroad, it also operates a joint rapid transit service between Hudson Terminal and Newark, over appellant's line to Journal Square, thence over the Pennsylvania through Harrison to Market Streets, Newark (R. 288). Passengers on these trains may transfer to or from the uptown line, where it connects with the downtown line in Jersey City (R. 288).

The 8-cent fare became effective on July 25, 1938, and has since been maintained (R. 220). Following the outbreak of the present war, and alleging changed conditions and increased costs as a result thereof, the carrier on June 27, 1942, filed a petition for further hearing and asking for leave to publish and charge a 10-cent fare (R. 249, 390). Protests against the increase were filed by the City of Jersey City (R. 404) and by the Hudson Bus Corporation. Thereafter the proceeding was reopened and testimony introduced before a Commission examiner in September 1942, covering a period of 7 days, and 919 typewritten pages of testimony.[5] In addition a large number of exhibits were presented and received.[6]

[5] This typewritten transcript and exhibits have not been printed but pursuant to stipulation of the parties, have been sent up as an original exhibit (R. 419), with leave to either side to refer to such transcript in brief and oral argument. Pages 1 to 1010, inclusive, of the transcript consists of the earlier hearing by the Commission, result-

During the course of this hearing, an attorney for the Price Administrator entered his appearance (O. R. U., September 17, 1942, pp. 1556–1557). He stated "The purpose of the appearance is to reserve the right for the Office of Price Administration to move, in connection with any of these hearings, and to file appropriate briefs in due time." He further stated (same record reference) that it was not his intention to offer any evidence at that time. Nor was any effort made by him during the course of the hearing, which concluded on September 19, 1942, to introduce any testimony. The Emergency Price Control Act of 1942 was passed Jan. 30, 1942 (56 Stat. 23). The Inflation Act of 1942 was passed October 2, 1942, c. 578, 56 Stat. 765, and contained a proviso that "no common carrier or other public utility shall make any general increase in its rates or charges which were in effect on September 15, 1942, unless it first gives thirty days notice to the President, or such agency as he may designate, and consents to the timely intervention by such agency before the Federal, State, or municipal authority having jurisdiction to consider such increase."

---

ing in its order of July 11, 1938 (R. 286), which was sustained by this court in *Hudson & Manhattan R. Co.* v. *United States*, 313 U. S. 98. Reference to the printed transcript will be made as (R. —) and to original record, unprinted, but lodged with the clerk as (O. R. U. —).

By order of November 13, 1942, the Commission acted favorably upon a request of the Office of Price Administration that it be permitted to file a brief (R. 311), which was in fact filed on December 14, 1942. It was urged therein that an increase in the fare on the downtown line of the Hudson & Manhattan Railroad Company was not justified by present conditions and to grant the increase would run counter to the Government's program to prevent inflation and to stabilize the cost of living. On January 25, 1943, the Commission examiner who heard the case issued a proposed report, recommending that the Commission find the applied-for rate of 10 cents on the downtown line to be just and reasonable. Exceptions to this report were filed by the City of Jersey City and the Price Administrator (R. 365), and the Administrator, at page 20 of his exceptions (filed March 8, 1943) said:

> * * * We did not nor do we now, suggest that this proposed increase in fare [from 8 to 10 cents] will in and of itself result in inflation. Such a suggestion would, of course, be asinine. * * * (R. 378.)

There was no claim in either of the exceptions that a full and fair hearing was not granted. The proceeding was argued before the entire Commission on April 20, 1943, by counsel for the carrier, Jersey City, and the Price Administrator. At that time a stipulation was

entered into between the parties to bring the record in certain respects up to date.*

At the April 20, 1943, oral argument, counsel for the Administrator did not contend that conditions had changed, on the contrary he opened his argument as follows (O. R. U., p. 2008):

> If the Commission please. I think it has been clearly demonstrated that there has been no change of conditions since this Commission's determination that the rate for this service, that a fair and reasonable rate is 8 cents, which warrants a 10-cent fare at this time."

The proceeding was decided by the entire Commission on June 8, 1943 (255 I. C. C. 649), at

---

*The stipulation referred to, dated April 20, 1943, (R. 410) provides that:

"*Whereas* the hearings and taking of testimony in the captioned proceeding were concluded on September 19, 1942; and

Whereas the parties hereto have agreed to supplement or otherwise bring the record up to date to the extent of showing the total patronage and revenues of the Hudson & Manhattan Railroad for the months of January and February, 1943,

Now therefore the parties hereto stipulate that the following Hudson & Manhattan Railroad figures and revenues should be incorporated into the record and made a part hereof:

	Total number passengers	Total revenue
January 1943	7,012,492	$577,342.66
February 1943	6,591,481	$543,554.36"

which time the Commission made the following findings:

> * * * Respondent's annual operating costs have increased since 1937 by about $671,500 and since 1941 by about $466,500, including the war contingency reserve of $240,000 a year for protection against extraordinary war hazards, which we may accept as reasonable, * * *. Taking into account those increased operating costs, together with the augmented traffic and revenues since the beginning of the war, we must next determine the probable future revenue results on respondent's lines under the present and the proposed fares. (R. 267.).
>
> * * * * *
>
> Economic and competitive conditions affecting respondent's traffic have, of course, changed materially since the prior decision, and a downtown fare of more than 8 cents would not now have as serious an effect in traffic diversion as would have been true in 1938. (R. 268.)
>
> * * * * *
>
> The avowed purpose of respondent in seeking the proposed fare increase is to meet increased operating expenses and the interest on its bonds. This it should be permitted to do if it can be done without casting an undue burden upon any particular traffic. (R. 269.)
>
> * * * * *

It seems to us that an increase of 1 cent in respondent's downtown fare is unlikely to have any inflationary effect, and that the effect thereof upon the cost of living, while a factor to be given consideration, will be so slight, a maximum of about 12 cents a week and 52 cents a month per passenger, as to be negligible. We believe, therefore, that the increased fare herein approved will not be in conflict with the Emergency Price Control Act of 1942, as amended.

(R. 270.)

Based upon the foregoing facts, we find that in order to meet increased operating expenses and the interest on its bonds, respondent is in need of additional revenue beyond that which may be expected from its present fares and divisions, and that a portion of such additional revenue can reasonably, and should be obtained by increasing its downtown fare from 8 to 9 cents.

(R. 271.)

* * * * *

* * * the increased fare should remain in effect for no longer than the duration of the war and six months thereafter. It should be understood that if at any time prior to the expiration of that period, by reason of changed conditions or otherwise, the revenue results to respondent should prove to be materially different from those estimated in this report, any party to this proceeding is of course at liberty to seek to

bring the facts with respect thereto to our attention at a further hearing.

(R. 271.)

* * * * *

* * * We further conclude that an increased local fare of 9 cents on respondent's downtown line has been justified, for application during the remaining period of the war and six months after its termination.

(R. 271.)

Following the rendition of this decision by the Commission, the carrier found that it could not avail itself of the increase allowed because of mechanical limitations in its fare collection boxes, so on July 8, 1943, it filed with the Commission a petition asking the right to charge a 10-cent fare until it could secure tokens, and also to remove the limitation that the fares were to expire six months after the war. (R. 327–336.) Jersey City's answer to this petition concluded:

It is the position of protestants that the petition should be denied, that the effectiveness of the decision dated June 8, 1943, should be indefinitely suspended and, in view of the questions and assertions now brought forth by respondent, [the mechanism of its fare boxes] that the proceeding should be set for further hearing. Otherwise, the petition, in its entirety, should be denied.

(R. 350.)

There was no claim of stale record made. On July 14, 1943, the Price Administrator filed his reply to the carrier's petition. Instead of attacking the increase to 9 cents, he advocated what he called a feasible scheme through the use of paper tickets to collect the 9 cents (Page 9 of O. P. A. reply to petition filed July 14, 1943) (R. 357). In conclusion, the Price Administrator asked that the fares go back to 8 cents in view of alleged increased earnings, and said (R. 364): "In any event, before the fares are increased on the basis suggested by the Company [a cash fare of 10 cents or an alternative fare of 11 tokens for a dollar] a further hearing should be held." The Commission issued another report on August 3, 1943 (R. 313), granting only in part the relief sought by the carrier.

It noted in its report that so long as appellant could not collect a 9-cent cash fare, appellant would lose in excess of $1,000 a day of the revenue the Commission had intended to accord appellant by such order (R. 319). In finding that it would be impossible for appellant to collect a 9-cent cash fare, the Commission said:

> Upon reconsideration, we affirm our prior conclusion that the proposed fare of 10 cents has not been justified for general application on respondent's downtown line. We further conclude that an increased local fare on respondent's downtown line on the alternative basis of 11 tokens for $1 or a

> cash fare of 10 cents, payable by a dime, has been justified for application during the remaining period of the war and 6 months after its termination; provided, that contemporaneously with the establishment and maintenance of such fares on the downtown line the same alternative basis, namely, 11 tokens for $1 or a cash fare of 10 cents, payable by a dime, be established and maintained on local interstate traffic on respondent's uptown line. (R. 325–326.)

The Commission, however, denied so much of the appellant's petition as asked for the removal of the limitation on such increased fares to the period of the duration of the war and six months thereafter, and also denied appellant the right to charge a 10-cent cash fare on its downtown line pending its ability to obtain tokens and to modify its fare collection boxes (R. 325).

On September 13, 1943, Jersey City filed its original complaint in the District Court specifically asking that the Commission's order of August 3, 1943, be enjoined only (R. 10)—

> *in so far* as such order permits the establishment of any local interstate fare *in excess of nine cents* for transportation on the downtown line. (Italics supplied.)

The original complaint alleged as the fundamental ground of the invalidity of the Commission's order of August 3, 1943, that:

> 17. It is apparent that the Commission, in authorizing local downtown fares *in ex-*

> *cess of the nine cent fare* stated to be the reasonable maximum charge in the report and order of June 8, 1943, 255 I. C. C. 649, does so wholly because of an alleged carrier disability. As to such alleged carrier disability the plaintiff (Jersey City) herein has been deprived of its full day in Court by not having been given an opportunity to cross examine witnesses, refute and otherwise present counter evidence, and the order was entered without due process of law. To the extent that the Commission considered *such matters* in this regard, it acted arbitrarily and beyond the realm of proper judicial procedure. (Italics supplied.)
>
> (R. 7.)

After the filing of this original complaint, the Commission, on September 18, 1943, reopened the proceeding on its own motion, but limited so as "to permit any party hereto to present evidence directed solely to the propriety and lawfulness of the modification made by the Commission in its report of August 3, 1943, on further consideration of its prior findings and orders of July 11, 1938, and June 8, 1943" and to afford "any party hereto * * * the right to cross-examine adverse witnesses" (R. 23). In its supplemental report of November 2, 1943 (hereinafter discussed), the Commission referred to this reopening as being "out of an abundance of caution" (R. 274). At any rate it complied with the Price Administra-

tor's request, contained in its reply of July 14, 1943, to the carrier's petition for reopening, wherein (R. 364). he prayed: "In any event, before the fares are increased on the basis suggested by the Company, a further hearing should be held." This further hearing was held on September 28–29, 1943, and as stated was limited to certain issues as raised in the Court suit.

At the reopened proceeding on September 28–29, 1943, the following occurred (O. R. U., p. 2036):

> Mr. EISEN. [Counsel for Jersey City]. May I determine, please, whether or not the parties to this proceeding will be precluded from bringing the record down to date insofar as it is stale and such procedure would preclude any finding with respect to revenues?
>
> Examiner KOCH. If that has a bearing upon the issue as I have described it, it will be permitted. We will see when we get to it the particular evidence you have in mind.

Testimony was introduced concerning the impossibility of collecting a 9-cent fare with the present fare collection boxes (O. R. U., p. 2039–2048) and the statement made that under a 9-cent fare the railroad's earnings would be $385,000 additional, or more than $1,000 each day (O. R. U., p. 2052–2053). The Chairman of the carrier's Board of Directors testified concerning the earnings of his company on the assumption that 90 percent of

the passengers would purchase tokens, and stated that he arrived at his estimate that 90 percent of his patrons would purchase tokens by discussing it with transportation men and from his own observation as to the character of the Hudson & Manhattan traffic (O. R. U., p. 2072). He discussed the ability of the passenger using the railroad to spend a dollar for tokens (O. R. U., p. 2161–2162).

At pages 2169–2170 Mr. Eisen, counsel for Jersey City, stated:

> I am trying to develop whether this company needs revenues in excess of that to be produced by a 9-cent fare and I think that is directly in issue. If anything in excess of 9 cents is not to be predicated on revenue needs then I would like to inquire upon what ground this case has been reopened.

The examiner ruled that the question of whether or not the proposed basis shall stand was, of course, then in issue here (O. R. U., p. 2186). When Witness Fritsch, for the company, was asked how much additional revenue the Hudson & Manhattan would have received if fares of 9 cents downtown and 11 cents uptown had been collected by the carrier under the *Ex Parte No. 148** increase permitted by the Commission in February 1942, counsel for the O. P. A. objected because he claimed such issues

*Under this decision, the H. & M. could have increased its downtown fare from 8¢ to 9¢ and its uptown fare from 10¢ to 11¢. It requested the Commission to eliminate it from the permission granted, which was done. (R. 249–250.)

were not within the scope of the hearing (O. R. U., p. 2212). Somewhat inconsistently, we think, he complained of the restricted scope of the hearing, when he said:

> If the Commission desires to give us an opportunity to file briefs and will give us a reasonable time to file a brief, we will take advantage of that opportunity; however, I should like to make it clear that, considering the basic issues in which the Price Administrator and the Economic Stabilization Director are interested, that the limited state of the record, and the denial of our right to demonstrate on the basis of the existing financial conditions and earnings of the company that no rate increase whatever is justified, that we would have very little use in presenting a brief to the Commission because of the denial so far of the right to open up the record. (O. R. U., p. 2475).

Nevertheless a brief was in fact filed by the O. P. A., as well as by all other parties to the proceeding.

The examiner offered to the parties the opportunity to argue the case before him or file written briefs with the Commission (O. R. U., p. 2268). They accepted the offer to, and did, file briefs. The examiner also informed counsel for the Price Administrator that if he presented sufficient reason he would be given further time to present his case (O. R. U., p. 2273). Subsequently, this counsel's request for an adjournment of a "couple of weeks" was denied (O. R. U., p. 2478).

Witness Kosh for the Price Administrator stated he had prepared a table showing the 7 months condensed income statement for the Hudson & Manhattan predicated on its own figures for the first 7 months of 1943 (O. R. U., p. 2446). The examiner ruled he would not receive it (O. R. U., p. 2447) because irrelevant under the previous rulings made by him.

A similar statement for the five months ending May 31, 1943, had been attached to the reply of the Price Administrator of July 19, 1943, to the appellant's petition of July 8, 1943, for reconsideration and modification of the Commission's findings and order of June 8, 1943. In the Commission's report of August 3, 1943, it had rejected that statement as being without probative value because it did not show the income of appellant from its railroad operations but was a consolidated statement of the income of the carrier from all operations, including its Hudson Terminal Buildings[1] and other real estate (R. 325).

The examiner rejected the proffered evidence as not being within the limitations of the Commission's order of reopening of September 18, 1943, but specifically advised counsel for the Price Administrator that if he desired to broaden the issues, he could petition the Commission for a

[1] The Hudson & Manhattan owns a large twin office building in New York City, described in the record (R. 290).

modification of that order for the purpose of receiving the rejected evidence (O. R. U., p. 2147–2148).

On October 14, 1943, the Price Administrator[8] filed a petition for modification of the Commission's order of reopening of September 18, 1943, so as

> to eliminate the restrictions heretofore imposed upon said reopened hearing, to reopen the proceeding for the purpose of receiving testimony and exhibits with respect to the revenues, income and expense of the company, in order that said record be brought up to date; including evidence and exhibits relating to the right and need of the company for an increase in rates, charges and revenues over and above those in effect on September 15, 1942, under the Interstate Commerce Act, and the Act of October 2, 1942. (R. 70.)

The only specifications in such petition of the purpose of adducing such evidence read as follows:

> 8. Counsel for the protestant stated if given an opportunity to demonstrate by

[8] By letter of October 25, 1943, counsel for Jersey City purported to —

> adopt and otherwise ratify the contents of the aforesaid (Price Administrator's) petition as though it were our own.

This letter did not comply with the Commission's General Rules of Practice respecting petitions for rehearing, etc., and consequently was not treated as such by the Commission in its report of November 2, 1943.

> presentation of evidence at the hearing, he would show that the earnings of the company, as a result of the war, at an 8-cent fare and for the full year 1943, would exceed the amount which the Commission found to be adequate and reasonable in its 1938 order or its order of June 8, 1943, authorizing an increase.
>
> (R. 69.)

On November 2, 1943, the Commission issued its report and order (R. 272) which, with the report of June 8, 1943 (R. 248), the District Court has enjoined. (R. 220.)

The Commission's report of November 2, 1943, after reciting that it issued the order of reopening of September 18, 1943 "out of an abundance of caution" (R. 274) stated, with reference to the further hearing held on September 28 and 29:

> At this further hearing both the New Jersey protestants and the Price Administrator noted their exceptions to the restriction of the scope of the further hearing as made in our order of September 18, 1943, and the Price Administrator's brief was accompanied by a motion filed in behalf of the Director of Economic Stabilization, for modification of our order of September 18, 1943, so as to reopen this proceeding "for the purpose of receiving testimony and exhibits with respect to the revenues, income, and expense of the company, in order that said record be brought up to date; including

evidence and exhibits relating to the right and need of the company for an increase in rates, charges, and revenues over and above those in effect on September 15, 1942, under the Interstate Commerce Act, and the act of October 2, 1942," called the Stabilization Act. To this motion respondent replied. Movant states that he wishes opportunity to exhibit the income and expenses of respondent for the first 7 months of 1943 and for the same period of 1942 for the purpose of showing that respondent's earnings under the present fares are adequate and that no increase in the present 8-cent downtown fare should be permitted. (R. 274.)

The Commission said:

In the complaint of the City of Jersey City before the District Court [i. e., the original complaint herein of September 13, 1943, then still pending before the District Court] no question has been raised as to our action authorizing an increase in the downtown fare from 8 to 9 cents, but only as to an increase from 9 to $9\frac{1}{11}$ cents. (R. 275.)

The Commission concluded:

At the time of the oral argument before us on April 20, 1943, on the facts of record upon which we issued our second report of June 8, 1943, the traffic and revenue results on the lines of respondent for the year 1942 and the traffic results for January and February, 1943, the latest periods for which any such results were then available, were by agree-

ment of the parties made a part of the record. The data then adduced, along with the other determinative facts of record, are set out in, and were considered by us at the time of our second report. Considering the contents of the motion now before us, and the offers of additional evidence made at the recent further hearing, we have no reason to believe that, if the additional hearing sought were held, we would feel warranted in modifying our findings as made in the second report. As will later appear, the alternative-fare basis herein approved can not be expected to yield materially better revenue results to respondent than we anticipated at the time of the second report. Accordingly, we see no sufficient reason for further reopening this proceeding at this time, and the motion will therefore be overruled. (R. 275.)

Having reached this conclusion, the Commission said:

Upon the amplified record before us, we find that the following basic facts, as underscored, have been established:

1. *It is impracticable for respondent to collect a cash fare of 9 cents.* (R. 276.)

2. *There is available to respondent no practicable method of collecting a fare of, or approximating, 9 cents except by the use of tokens.* (R. 277.)

3. *The use of tokens only for the local downtown traffic, while contemporaneously using cash fares for the other local traffic of respondnt, is impracticable.* (R. 278.)

4. *The use of an alternative-fare basis of 11 tokens for $1 or a cash fare of a dime for local interstate passengers on both the downtown and uptown lines is the only practicable method now available by which respondent can reasonably be expected to obtain the financial benefits contemplated by our findings and conclusions in the second report (i. e. June 8, 1943) as necessary to insure adequate transportation service.* (R. 278.)

5. *The modification of our prior findings as made in the third report of August 3, 1943, is not in conflict with the Emergency Price Control Act of 1942, as amended by the Stabilization Act.* (R. 282.)

6. *A cash fare of 10 cents for the occasional or irregular passenger on the downtown line compares favorably with the reasonable charge made for similar service on railroads generally.* (R. 283.)

The Commission's ultimate conclusion was:

Upon consideration of the entire record, and more particularly of the foregoing findings of fact, we affirm our conclusions in the report on reconsideration of August 3, 1943, namely, that a local interstate fare on respondent's downtown line on the alternative basis of 11 tokens for $1 or a cash fare of 10 cents, payable by a dime, has been justified as reasonable and otherwise lawful, for application during the remaining period of the war and 6 months after its termination; provided that contemporaneously with the establishment and mainte-

nance of such fares on the downtown line, the same alternative basis be established and maintained for local interstate traffic on respondent's uptown line.
(R. 284.)

On November 18, 1943, Jersey City filed its amended complaint herein asking that the Commission's orders of June 8, 1943, and November 2, 1943, be perpetually set aside, annulled, and enjoined insofar as such orders permitted any fare on appellant's downtown line in excess of 8 cents (the fare authorized by the Commission's order of June 11, 1938) (R. 40).

The Price Administrator filed his petition of intervention alleging that the Commission's orders in permitting an increase over the 8-cent fare in effect on September 15, 1942 (i. e., the fare authorized by the Commission's order of June 11, 1938), were in violation of the Stabilization Act (the Inflation Control Act) of October 2, 1942 (R. 64).

The United States was named as a defendant but filed a neutral answer on the ground that a question of the relative powers of two agencies of the government were involved (R. 92).

The Commission and the appellant Railroad Company filed answers to the amended complaint and to the petition of intervention (R. 71, 88).

Both appellees applied for an interlocutory injunction, which was granted November 26, 1943 (R. 116), and on January 12, 1944, the majority of the court below rendered an opinion (R. 194),

Judge Fake dissenting (R. 201), holding the order invalid because of the Court's view that the Commission had denied a full hearing in refusing to reopen the proceedings to receive evidence relating to 1943 earnings of the carrier (R. 199), and that the Commission had not given sufficient consideration to the question of the inflationary aspects of the case (R. 201).

From the final decree granting a permanent injunction the Commission and the carrier appealed to this Court, and probable jurisdiction was noted April 3, 1944 (R. 433).

SUMMARY OF ARGUMENT

1. The Commission conducted elaborate hearings, at which the City of Jersey City appeared and introduced considerable evidence, and at which the Price Administrator entered an appearance but did not seek to introduce any evidence as to the inflationary effects of the Hudson & Manhattan's application for an increase in its downtown fare from 8 cents to 10 cents to meet increased costs due to the war. As a result of these hearings the Commission on June 8, 1943, permitted an increase in the downtown fares, not to the 10 cents sought by the carrier, but to 9 cents, an increase of 1 cent in the present fare. The report of June 8, 1943, contained a full discussion by the Commission as to the reasons for its action. Following this decision authorizing

the 1-cent increase, the carrier filed a petition with the Commission alleging that on account of the mechanism of its fare collection boxes, it was impossible to collect the 9-cent fare, which necessitated the use of 5 coins, all dropping into the box at the same time, and further alleging that due to the war new fare collection boxes could not be obtained, even if such boxes could be constructed to handle 5 coins at one time. Without further hearing, but following printed replies by the City of Jersey City and the Price Administrator, the Commission, on August 3, 1943, permitted a modification of its order so that the carrier could sell 11 tokens for a dollar, or at the rate of $9\frac{1}{11}$ cents a ride (or 10 cents cash for the rider preferring not to buy tokens), the tokens to be used interchangeably on the uptown line, where the fare for many years had been 10 cents cash, and on the downtown line. Thus the increase in the downtown fares was offset to some extent by the decrease in the uptown fares. Jersey City filed a complaint in the District Court attacking the action of the Commission in permitting any increase over 9 cents on the ground that the action of the Commission had not afforded it an opportunity to be heard. The Commission then reopened the case limited to the issue as to the modification of the 9-cent fare, and overruled the contention of the Price Administrator to the effect that the case should be reopened without

restriction, or at least to the extent of permitting him to show that due to increase in number of passengers carried, the Hudson & Manhattan would make sufficient money to meet increased operating expenses and the interest on its bonds under the 8-cent fare. The Commission conducted a rehearing, considered the contention and weighed the proposal of the Price Administrator and the evidence attached to his motion to reopen, and held that it was not sufficient to change its conclusions as to the reasonableness of the rate established by it. This was done in a third report dated November 2, 1943. The increases authorized were to expire 6 months after the termination of the war. We contend that a full hearing was not denied here any more than in *Vinson* v. *Washington Gas Light Co.*, decided March 27, 1944.

2. The Commission did not "lightly brush aside" as found by the District Court, in a divided opinion, the contentions of the Price Administrator that the increase would have an inflationary effect. As shown by its reports in this case, and in other cases to which it referred herein, where similar contentions had been made, it has always carefully considered this argument. There is no question but that the costs of the carrier have gone up due to war conditions and it, being exclusively a passenger-carrying road, must look to the passengers to supply it with additional revenues. To show the inflationary ef-

fects of an increase, the Administrator must do more than make a general allegation that inflation will result. *Vinson* v. *Washington Gas Light Co., supra.* It was not his contention that the increase in and of itself would be inflationary, indeed he admitted that such an argument would be "asinine". It was his point that the increase would be the beginning of a spiral of increased costs, which should be nipped at its inception. The District Court (Judge Fake dissenting) adopted this view. But it will have to be admitted that the costs of the carrier have increased and as the Commission has no jurisdiction over anything but the rates of the carrier, it had no alternative but to authorize an increase in rates to meet the increased costs.

3. The evidence was sufficient to support the order. It was substantially the same as that found sufficient in a prior case involving the same company, *Hudson & Manhattan R. Co.* v. *United States,* 313 U. S. 98. This evidence, set forth in some detail in an appendix to the brief, showed characteristics of the carrier; increase in traffic due to the war; bus competition; estimates of diversion; commutation fares of other railroads; traffic density; ferry fares and competition, etc. There was in this evidence that out of which a body of experts could name a rate. (*Interstate Commerce Commission* v. *Union Pacific R. R.,* 222 U. S. 541, 550.)

ARGUMENT

I

The Commission Did Not Err in Refusing, After Having One Full Hearing upon Which It Authorized an Increase in Passenger Fares, to Reopen the Proceeding on All Issues

We do not think it will be seriously contended that, as found by the Commission (R. 267), the costs of operating the Hudson & Manhattan Railroad Company have greatly increased due to war conditions. The difference in the respective contentions appears to be: The Commission thinks that these increased costs should be borne by a slight increase in the fares paid by the passengers of the carrier, and it, being exclusively a passenger-carrying railroad, cannot look elsewhere for increased revenues; on the other hand the City of Jersey City and the Price Administrator argue that the increase in the number of passengers carried due to war conditions, will result in such an increase in revenue to the carrier that an increase in fares is not justified. The Commission, of course, has the duty of seeing to it that the railroads of the United States are given sufficient income to provide the people of the United States with an adequate system of transportation (*New England Divisions Case,* 261 U. S. 184, 189) and it has found, in this very case, that the increase authorized is necessary for the Hudson & Manhattan "to meet increased operating expenses and the interest on its bonds" (R. 269),

and "to insure adequate transportation service." (R. 278.)

This court has often said that it will not substitute its judgment for that of the Commission on administrative matters. The Commission gave full consideration to the increased revenues resulting to the carrier from its increase in traffic (R. 268), nevertheless, it found that the increase was justified. It would appear to be a clear substitution of judgment for the court to hold that, instead of looking to each passenger to pay a modest increase, the carrier instead should be restricted to meeting increases in costs solely out of the number of passengers carried, which fluctuates from month to month, figures with respect to which were before the Commission down to the latest available at that time. (R. 267–8.) It is to be remembered also that the increase in fares is limited to the war's duration and 6 months thereafter (R. 283–4), clearly showing that in the view of the Commission it is a war emergency measure.

In considering whether the Commission erred, as held by the lower court, in not reopening the proceedings without restriction as contended by the Price Administrator, we must have in mind what Judge Fake, in his dissenting opinion below, said:

> Of course the flow of economic change never stops—always and forever the comings and goings and doings of man have their effect in preventing a static period at

> which time the Commission might stop and make a decision. Always the point of termination must be fixed in the midst of fluctuations in the economic factors involved. * * * (R. 205.)

The granting or denying of a petition for rehearing is discretionary with the Commission. Section 17 (6) of Part I of the Interstate Commerce Act, among other things, provides:

> * * * Rehearing, reargument, or reconsideration may be granted if sufficient reason therefor be made to appear; but the Commission may, from time to time, make or amend general rules or orders establishing limitations upon the right to apply for rehearing, reargument, or reconsideration of a decision, etc.[9]

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[9] The Rules of Practice of the Commission, effective September 15, 1942, provide in Rule 101 for the filing of petitions for rehearing. That Rule reads: (R. 87–88)

> *Rule 101. Petitions for rehearing, reargument, or reconsideration.*—(a) IN GENERAL.—A petition seeking any change in a decision, order, or requirement of the Commission should specify whether the prayer is for reconsideration, reargument, rehearing, further hearing, modification of effective date, vacation, suspension, or otherwise.
>
> (b) REHEARING OR FURTHER HEARING.—When in a petition filed under this rule opportunity is sought to introduce evidence, the evidence to be adduced must be stated briefly, such evidence must not appear to be cumulative, and explanation must be given why such evidence was not previously adduced.
>
> (c) MODIFICATION OF EFFECTIVE DATE.—A petition under this rule seeking only modification of the effective date of a decision, order, or requirement, or in the period of notice, or other period or date prescribed

We think the facts in this case clearly show that there was no abuse of discretion on the Commission's part. A chronology of those facts follows:

On June 27, 1942, more than 6 months after our entrance into the war, the carrier filed its application for an increase in its passenger fares on the downtown line (R. 249, 390).

On July 6, 1942, Jersey City filed its opposition to this petition (R. 404), and on July 10, 1942, the Hudson Bus Corporation filed another statement in opposition.

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therein, must be filed seasonably, except that, in case of unforeseen emergency satisfactorily shown by petitioner, such relief may be sought informally, by telegram or otherwise, provided like notice is simultaneously communicated to all parties of record.

(d) RECONSIDERATION.—If relief under this rule other than under subdivisions (b) and (c) is sought, the matters claimed to have been erroneously decided and the alleged errors or relief sought must be specified with the particularity respecting exceptions as outlined in rule 96 (a), as should also any substitute finding or other substitute requirement desired by petitioner.

(e) TIME FOR FILING.—Except for good cause shown, and upon leave granted, petitions under this rule must be filed within 30 days, after the date of service of a decision or order granting an application in whole or in part, and within 60 days after the date of service of any other character of decision or order.

(f) SUCCESSIVE PETITIONS ON SAME GROUNDS, NOT ENTERTAINED.—A successive petition under subdivision (d) of this rule filed by the same party or parties, and upon substantially the same grounds as a former petition, which has been considered and denied by the entire Commission, or by an appropriate appellate division, will not be entertained.

(R. 87–88).

On July 13, 1942, the Commission reopened the proceeding for further hearings (R. 412).

From September 9 to 12, inclusive, and also on September 17, 18, and 19, 1942, hearings were conducted before an examiner. At these hearings counsel for the Price Administrator entered an appearance but introduced no evidence (O. R. U., p. 1556–1557) (R. 264).

On September 19, 1942, the last day of the hearing, the examiner gave all parties 30 days, or until October 19, 1942, to file briefs (O. R. U., p. 1928).

On October 24, 1942, briefs were filed by all parties other than the Price Administrator, whose brief was in fact filed on December 14, 1942, upon special permission granted.

On January 25, 1943, the examiner's proposed report was issued, recommending a 10-cent fare on the downtown line.

On March 8, 1943, exceptions to the report were filed by the City of Jersey City and the Price Administrator (R. 365). On March 18, 1943, the Hudson & Manhattan filed a reply to these exceptions.

On April 20, 1943, a stipulation was signed by all counsel directing attention to the closing of the hearing in September 1942, and stipulating that the total number of passengers and total revenue for the months of January and February, 1943, the last months for which those figures were available, should be incorporated into the record to bring it down to date (R. 410).

On the same date, April 20, 1943, the case was argued and submitted to the full Commission for decision. (R. 248.)

On June 8, 1943, the Commission issued its report, finding that a 9-cent fare had been justified on the downtown line (R. 248). Three of the Commissioners thought that the carrier had justified a 10-cent fare; none voted for less than 9 cents (R. 271-272).

If it had been practicable for the carrier to have availed itself of this permission to collect 9 cents per passenger, it would have been receiving about $1,000 a day more in revenue, to which the Commission had found it entitled, since June 1943 (R. 319). However, because of mechanical limitations in the fare collection boxes, the carrier on July 9, 1943, filed a petition for reconsideration, setting up such mechanical limitations, and asking for leave to charge 11 tokens for a dollar or 10 cents in cash, and until such essential metals could be secured to strike off the tokens to charge 10 cents in cash, the fares to be uniform on both the downtown and uptown lines (R. 327).

On July 17 and 19, 1943, the City of Jersey City and the Price Administrator filed replies to the carrier's petition. (R. 345, 352.)

The Price Administrator in his reply suggested that before "the fares are increased on the basis suggested by the Company [that is, 11 tokens for a dollar or 10 cents cash] a further hearing should be held" (R. 364).

On August 3, 1943, the Commission issued its report on reconsideration, modifying its findings of June 8, 1943, so as to find justified an alternative fare of 11 token for a dollar or 10 cents in cash, and denying the carrier's petition in other respects.

On September 13, 1943, Jersey City filed its original complaint in the District Court, attacking the increase only insofar as it authorized fares in excess of 9 cents, claiming it had been denied a hearing on the necessity of selling tokens and the modification allowed by the August 3, 1943, decision (R. 7, 10).

On September 18, 1943, the Commission "out of an abundance of caution" (R. 274) reopened the case on certain issues.[10]

On September 28–29, 1943, the reopened proceedings were further heard, and on October 14,

[10] The order of reopening (R. 23) reads as follows:

Upon further consideration of the record in the above-entitled proceeding, and good cause appearing,

It is ordered, That this proceeding be reopened for further hearing to permit any party hereto to present evidence directed solely to the propriety and lawfulness of the modifications made by the Commission in its report of August 3, 1943, on further consideration of its prior findings and orders of July 11, 1938 and June 8, 1943; that at such further hearing any party hereto shall have the right to cross examine adverse witnesses, and, upon the conclusion of such hearing, any party so desiring may make oral argument before the examiner, but no further briefs shall be submitted, nor shall a proposed report be issued, nor shall there be further argument before the Commission.

It is further ordered, That this proceeding be assigned for such further hearing before Examiner Koch

1943, the Price Administrator filed a petition seeking to supplement the record to bring it "up to date." (R. 67.)

On October 25, 1943, the carrier filed a reply to the petition of the Price Administrator (R. 380).

On November 2, 1943, the entire Commission rendered its decision, finding as a result of the new hearing, that the carrier had justified the modifications sought, namely: in lieu of a 9-cent uncollectible fare, a fare of 10 cents cash or 11 tokens for a dollar, applicable on both the uptown and downtown lines (R. 272). As the former fare on the uptown line had been 10 cents cash, the modified order resulted in a decrease. The lower court has annulled the orders of June 8, 1943, and November 2, 1943, on two grounds, one of which was that the Commission denied a fair hearing. (R. 197.)

The above facts, recited in some detail, refute this holding. It is submitted that the Commission, considering the size of record and the vigor with which the case was prosecuted by both sides, proceeded with reasonable despatch. In fact no claim of error was made at the time the Commission authorized an increase to 9 cents (R. 248). But for the impossibility of collecting such a fare

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in the Commission's Offices at Washington, D. C., on September 28, 1943, at 10:00 o'clock A. M.

The September 18 order was modified at the hearing closed on September 29, 1943 by all parties agreeing to file briefs to be submitted to the Commission and waiving oral argument (O. R. U. 2476-7).

with the present boxes, it is likely there would have been no law suit, for when Jersey City filed its original complaint, it did not attack the increase to 9 cents, but only the modifications made by the August 3, 1943, report. (R. 7, 10.) If the appellees really thought that conditions had radically changed, they would not have sat idly by and let the Commission decide the case, on the theory (1) that perhaps the decision would be in their favor by denying the increase, or (2) if the increase was granted, then they would attack the order on the ground that the record was not representative of present conditions. The situation is very much like that before this court in *United States* v. *Northern Pacific Ry. Co.*, 288 U. S. 490, where, at page 494, this court said:

> * * * The decision in the *Santa Fe case* is not to be extended to require a rehearing in every rate case for changed economic conditions, however insignificant the effect of the order on carrier revenue. The rule announced, while intended to safeguard substantial rights of the railroads, may not be invoked where its application would disenable the Commission to protect the interest of the public.
>
> Though the order substantially reduced the carriers' revenues, we do not consider the merits of the application for rehearing, as we think the carriers' lack of diligence in bringing this matter to the Commission's attention deprived them of any equity to complain of the refusal of their petition.

> They sat silent and took the chance of a favorable decision on the record as made. They should not be permitted to reopen the case for the introduction of evidence long available and susceptible of production months before the Commission acted. The denial of a rehearing, in view of this delay, was not such an abuse of discretion as would warrant setting aside the order.

Any other rule, so it seems to us, would "disenable the Commission to protect the interest of the public". For, as is well known and as Judge Fake points out in his dissent (R. 105), conditions are not static and there is no "period at which time the Commission might stop and make a decision". In a case of this kind, of necessity the Commission must stop and study the evidence in order that it make findings that comport with the evidence (*Florida* v. *United States*, 282 U. S. 194, 215). If it does so, must it take the risk that its report will be set aside because of "changing conditions"? The choice then left to the Commission would be indeed "between the rock and the whirlpool".

The decision in the *Santa Fe case* [284 U. S. 248] upon which the lower court relied, rests on its own peculiar facts, and its doctrine will not be extended, as the decision in the *Northern Pacific case, supra*, shows. In the *Santa Fe case* the record closed in September 1928 prior to the economic depression of 1929. The petition for rehearing, which was denied, was filed 2½ years later, when conditions of course

were altogether different. Under such circumstances, this court held, in the *Santa Fe case,* that the Commission had abused its discretion in denying the petition for rehearing. In a subsequent case, *Baltimore & Ohio R. Co.* v. *United States,* 298 U. S. 349, Justice Brandeis (concurring on behalf of four Justices) speaking of the *Santa Fe case,* said (p. 389):

> The case at bar is not like *Atchison, T. & S. F. Ry.* v. *United States,* 284 U. S. 248, where the order was set aside because the Commission refused to reopen the case and hear additional evidence. That offered was of changed conditions; important, because every rate-order is subject to revision upon changes in conditions, and the change which had occurred since the hearing was catastrophic. To refuse to reopen the hearing under those circumstances was held to be an abuse of discretion. In the case at bar no controlling change of condition was alleged. There was not even a claim of newly discovered evidence. The *Atchison* case rests upon its exceptional facts. It is apparently the only instance in which this Court has interfered with the exercise of the Commission's discretion in granting, or refusing, to reopen a hearing. Compare *United States* v. *Northern Pacific Ry.,* 288 U. S. 490, 492 *et seq.; Illinois Commn* v. *United States,* 292 U. S. 474, 480–481; *St. Joseph Stock Yards Co.* v. *United States, ante,* p. 38.

Then, also, substantially the same information that the appellee sought to have the Commission

consider had been called to its attention for at least the first 5 months of 1943. In the report of August 3, 1943, the Commission said (R. 324):

> The number of interstate local passengers carried on the downtown line in the first half of 1943, as shown in respondent's petition, adjusted to an annual basis, reflects an increase over 1941 of 18.2 percent, compared with an increase of 12.7 percent as estimated by us in arriving at the forecast of probable revenue results made in the prior report. The traffic or revenue results from respondent's railroad operations as a whole, however, for the first half of 1943 or for any other period subsequent to those for which the results were of record at the time of the prior report, are not before us, and we have no reason for believing that they vary substantially from the estimates employed in arriving at our forecast of respondent's probable net income available for bond interest as set forth in that report.
>
> The Price Administrator in his reply does show what purports to be the amount by which respondent failed to earn its full interest requirements in the first 5 months of 1943. The "deficit" so shown is $75,798, and for the 12 months of the year would be $181,915, which, according to this protestant, would leave available $1,203,635 for interest on the income bonds, equivalent to 4.34 percent on $27,711,000 of such bonds, or approximately the same interest rate, 4.42 percent, as we estimated would

> result from the amount so available under a 9-cent fare. Accordingly, it is argued that respondent is not now in need of any increase in its downtown fare. It is apparent, however, that the "deficit" and other results given for the 5-month period are not for the railroad operations only, but also include the operation of respondent's terminal building, and therefore are of no value to us in determining whether or not there has been any important change in the revenue results from the railroad operations since the record on which the prior report is based was closed.

Apparently what the Price Administrator wanted to do was to show the same information for a 7 months' period (R. 69) instead of the 5 months' figures the Commission considered, as shown by the last quotation. In the report of November 2, 1943, the Commission said (R. 275):

> Movant states that he wishes opportunity to exhibit the income and expenses of respondent for the first 7 months of 1943 and for the same period of 1942 for the purpose of showing that respondent's earnings under the present fares are adequate and that no increase in the present 8-cent downtown fare should be permitted.

Such motion was denied for the reason, as explained in the Commission's report of November 2, 1943 (R. 275), as follows:

> At the time of the oral argument before us on April 20, 1943, on the facts of record

> upon which we issued our second report of June 8, 1943, the traffic and revenue results on the lines of respondent for the year 1942 and the traffic results for January and February 1943, the latest periods for which any such results were then available, were by agreement of the parties made a part of the record. The data then adduced, along with the other determinative facts of record, are set out in, and were considered by us at the time of, our second report. Considering the contents of the motion now before us, and the offers of additional evidence made at the recent further hearing, we have no reason to believe that, if the additional hearing sought were held, we would feel warranted in modifying our findings as made in the second report. As will later appear, the alternative-fare basis herein approved cannot be expected to yield materially better revenue results to respondent than we anticipated at the time of the second report. Accordingly, we see no sufficient reason for further reopening this proceeding at this time, and the motion will therefore be overruled.

As stated by the Commission in its report of June 8, 1943, "the Price Administrator offered no evidence" (R. 264). The situation of the Price Administrator in this case is quite like that of the Administrator before the District of Columbia commission which was before this Court in *Vinson, Director* v. *Washington Gas Light Co.*, No. 396, decided March 27, 1944. This Court there said:

> The petitioners seek vacation of the order on the ground that the Commission denied them a full and fair hearing. This contention is based upon the substantive contention that, under the Acts of January 30 and October 2, 1942, they were entitled to demand that the Commission enlarge the scope of the hearing and convert the inquiry into one whether an increase of rates was necessary to the company to prevent hardship. The Commission, on the other hand, insists that it was entitled to conduct the proceedings in accordance with its statutory powers as they existed prior to 1942, and, at most, accord the petitioners a full hearing as to the effect of any order in its relation to inflation in the war emergency. Thus it appears that the controversy is essentially one between two governmental agencies as to whether the powers of the one or the other are preponderant in the circumstances.
>
> In view of the petitioners' insistence that they were entitled, in effect, to control and direct the inquiry without regard to the statutory powers of the Commission, we shall first examine the extent of the authority conferred upon petitioners by Congress.

With respect to the participation of the Administrator in rate cases, the opinion reads:

> * * * Evidently Congress intended to grant the Administrator plenary control over commodity prices, since they generally were not the subject of local regulation,

but in both the original Act and the amendment, as this court has recently said in *Davies Warehouse Co.* v. *Bowles,* No. 112 October Term 1943, was careful "to avoid paralyzing or extinguishing local institutions." Thus it limited the right of the Executive to notice by the utility and the utility's consent that the Executive might be heard by the regulatory body having final authority in the premises.

If the petitioners were admitted as intervenors by a state commission, or by the District Commission, which is a respondent here, they might, of course, be admitted to participation in the proceeding upon reasonable terms; and one of the most usual procedural rules is that an intervenor is admitted to the proceeding as it stands, and in respect of the pending issues, but is not permitted to enlarge those issues or compel an alteration of the nature of the proceeding. To this effect was the Commission's rule on the subject. It would seem then that, in the absence of clear legislative mandate to the contrary, the petitioners should not possess greater rights than other intervenors.

This the petitioners deny. They say that, notwithstanding the absence of any categorical enactment, the general purpose of the original Act and its supplement show that Congress intended to prohibit state and local regulatory authorities from permitting any increase in utility rates which were not shown to be necessary to prevent

> actual hardship. We are asked then, not only to revise the views expressed in *Davies Warehouse Co.* v. *Bowles, supra,* as to the scope of the Acts, but to infer from a general expression of congressional policy, the limitation of existing powers conferred by law on regulatory commissions throughout the nation, both state and federal, and the endowment of a different federal agency with new and superior rights and powers. This we are unable to do.

The Court sustained the procedure followed by the District of Columbia Commission and its opinion concludes as follows:

> * * * In short, if the inquiry was limited to the issues comprehended in the Commission's order of investigation, the petitioners were afforded every opportunity for a full hearing. On the subject respecting which the petitioners were especially competent to enlighten the Commission,—namely the inflationary effect of a rate increase of 2.28% for one year, amounting, on the average, to three cents per month per customer, in the light of wage increases and increased commodity prices and overall conditions in the national economy,—no evidence was tendered by petitioners, in response to repeated invitations by the Commission.

It cannot be urged by appellees that until the Commission decided the case on June 8, 1943 (R. 248), finding a 9-cent fare on the downtown line justified, any claim was made by them that condi-

tions had changed so as to make the record unrepresentative. They took a chance on a favorable decision on the record as made. Between the date of its report of June 8, 1943, and the Commission's report on rehearing November 2, 1943, less than 5 months elapsed. It is hardly likely, in view of the full picture that the Commission had before it and which has been heretofore referred to, that any great change in conditions occurred requiring the Commission to in effect scrap everything it had done and reopen the case without restriction as to the character of the evidence. In *Acker* v. *United States,* 298 U. S. 426, at page 433, this Court said:

> The amended petition was filed about three months after the original order issued. It is inconceivable that economic conditions had so altered in this brief period as to demonsfrate that the new schedule of rates, if just when promulgated, had become unjust and oppressive. The schedule should have been given a trial and any alteration or modification should have been asked in the light of more extensive experience. We are unable to find anything arbitrary or unreasonable in the denial of the petitions.

The Commission in its report of August 3, 1943, adverted to the fact that had the Hudson & Manhattan availed itself of the permission granted in *Ex Parte 148,* the *General Increase Case,* to advance its fare 10%, such fares would have been 11

cents on the uptown line and 9 cents on the downtown line (R. 318). If it had done so the increased revenue it would have collected in 17 months was estimated to amount to $750,000 (R. 319). This is increased revenue to which the carrier was found entitled by the Commission. Considering the fact that it has lost this large amount, and also that the increase above 8 cents is to terminate six months after the close of the war, it would seem that it is entitled to the relief now if it is to be effective at all. The rates should be tried out at least for an experimental period, remembering that any party in the light of that actual experience is free to return to the Commission to seek a modification of its findings (R. 282).

Not only that, but when the Commission found, based upon the record made in 1942, that approximately 90% of the patrons of the railroad would purchase tokens and only 10% pay the higher cash fare, an estimate which the Commission said "we may accept as reasonable" (R. 322) the Price Administrator urged, based upon a report made in 1937 (R. 279) that such an estimate was unjustified.[11] In other words he criticises the Commis-

[11] Mr. Brown, Chairman of the Board and a former Postmaster General, testified that he arrived at his estimate that 90% of the patrons of his company would purchase tokens by discussing it with transportation men and from his own observation as to the character of the traffic on the Hudson & Manhattan (O. R. U. 2072). See also, O. R. U. 2161. He also testified as to the ability of the patron of his line to spend a dollar for tokens at one time (O. R. U. 2161–2162).

sion for not reopening the case to permit the introduction of evidence with respect to a very few months in 1943 following a decision of June 8, 1943 (R. 248), and at the same time inconsistently relies upon a 1937 report to try to weaken the use of the Commission's 90%–10% ratio, a ratio fully discussed in the final report (R. 279–282) and shown heretofore (p. 48) to be supported by the evidence.

Finally, on this point, we quote from the 1943 report of the Section of Public Utility Law to the American Bar Association on "Problems of Rate Making in the Emergency," undated, which, at p. 48, reads:

> It is doubtful that intervention by the Office of Price Administration in proceedings involving investigations of the reasonableness of existing rates and the filing of complaints as to the level of such rates are proper in view of the express language of the Congressional act. This proposition, however, has not been passed upon by the courts. It is the consensus of the committee that existing regulatory agencies are capable of protecting the public from unreasonable rates—such agencies are fully conscious of existing economic conditions and the evils of inflation. Undue interference with their powers and prerogatives will not be permitted without a struggle. When the war is over and there is a return to normalcy the established regulatory

> agencies must then carry the burden of regulating utilities and common carriers. Agencies created because of the war will be soon forgotten.

A "full hearing" was defined by this court in the *New England Divisions Case*, 261 U. S. 184, at page 200, as follows:

> A full hearing is one in which ample opportunity is afforded to all parties to make, by evidence and argument, a showing fairly adequate to establish the propriety or impropriety, from the standpoint of justice and law, of the step asked to be taken. The Commission recognized, and observed, these essentials of a full hearing.

It seems clear that the Commission granted a full and fair hearing to all parties in this proceeding.

II

The Commission Did Not Disregard the Provisions of the Inflation Act of October 2, 1942

We think that the holding of the lower court that the Commission "lightly brushed aside" the contentions of the Administrator (R. 199) with respect to the inflationary aspects of a rate increase is clearly erroneous and contrary to the facts.

The Commission has always given respectful consideration to the contentions of the Price Administrator and the Director of Economic Stabilization; it has recognized, however, that it should be supplied with evidence in support of these con-

tentions. One of the leading cases in which its views on this question are expressed is its report of December 18, 1942, in *Increases in Texas, Rates, Fares, and Charges,* 253 I. C. C. 723, where, at pages 733–734, the entire Commission said:

> By brief filed October 12 and at the argument on November 5, 1942, the Price Administrator, representing himself and the Director of Economic Stabilization, actively opposed the proposed increases in this proceeding within the State of Texas. He urged that, under the Emergency Price Control Act, as amended, in determining the lawfulness of proposed increases in rates, fares, or charges for transportation by common carriers subject to our jurisdiction, the effect of such increases on the price control and stabilization program is a factor which we can and should consider in addition to the factors ordinarily considered under the Interstate Commerce Act.
>
> The amendatory act of October 2, 1942, makes no direct changes in, or additions to, the administrative provisions of the Interstate Commerce Act relative to transportation rates and charges, except the requirements as to notice to, and intervention by, the designated Federal agency, which requirements have been met in this case. Its provisions are similar in some respects to those contained in the Agricultural Adjustment Act of 1938, section 201 (a) (7 U. S. C., Supp., IV. 1291) and in the Bituminous Act of 1937, section 16 (15 U.

S. C., Supp. III, 836), authorizing the Secretary of Agriculture and the Bituminous Coal Commission to file complaints with us with respect to the rates on farm products and coal, respectively, and providing that, before hearing or disposing of any complaint filed by any person other than the Secretary of Agriculture concerning rates on farm products, or the Bituminous Coal Commission with respect to rates on coal, we shall notify those respective agencies of such proceedings and, upon their application, shall permit them to appear and be heard. It has never been contended that those provisions modified the provisions of the Interstate Commerce Act.

* * * * *

We are not unmindful of the evil effects of inflation, and, in our judgment, the inflationary tendencies of general increases in rates constitute a factor which we may and should take into consideration in passing judgment upon such increases. See sections 1 and 15a of the Interstate Commerce Act, the national transportation policy contained in section 1 of the Transportation Act of 1940, and *Texas & P. Ry. Co.* v. *Interstate Commerce Commission*, 162 U. S. 197. Increases in the general price level ultimately affect the costs of rendering transportation service and the value of such service to the public. Such considerations were in fact carefully weighed and reflected in the increases which we authorized under *Ex Parte No. 148.*

> These increases were graded from nothing at all through 3 percent and 6 percent on freight to 10 percent on passenger traffic. * * *

Without repeating those views in its reports of November 2, 1943 (R. 272), in this case, it made reference to the *Texas Case*, among others (R. 283).

In the Commission's report of June 8, 1943 (R. 248), the Commission also said:

> The Emergency Price Control Act of 1942, as amended by the Stabilization Act of October 2, 1942, is designed in general to prevent inflation or increased living costs. It provides, however, that nothing in that act shall be construed to authorize regulation of rates charged by any common carrier or other public utility. An executive order of the President, dated April 8, 1943, reads in part as follows:
>
> > The attention of all agencies of the Federal Government, and of all State and municipal authorities, concerned with the rates of common carriers or other public utilities, is directed to the stabilization program of which this order is a part so that rate increases will be disapproved and rate reductions effected, consistently with the Act of October 2, 1942, and other applicable federal, state or municipal law, in order to keep down the cost of living and effectuate the purposes of the stabilization program.

> The Price Administrator urges that successful control of threatened increases in rates is now wholly dependent upon agencies such as the Commission, and that it is our primary responsibility to prevent inflationary rates and charges in this field, and to forestall unnecessary increases in the cost of living which would result from higher rates and charges. The proposed increase, when coupled with other increases in the cost of living, he maintains, would "commence the rise of that spiral which, if not arrested, must lead to inflation." He takes the position that any increase in rates or fares, unless clearly shown to be necessary to preserve existing facilities under current conditions, would be in conflict with the Administration's price control program, and that since the increase here proposed would have a substantial bearing upon the cost of living in the communities served by respondent, it would be contrary to the Stabilization Act and should be condemned. (R. 265.)

In its major findings and conclusions (R. 270), the Commission found:

> It seems to us that an increase of 1 cent in respondent's downtown fare is unlikely to have any inflationary effect, and that the effect thereof upon the cost of living, while a factor to be given consideration, will be so slight, a maximum of about 12 cents a week and 52 cents a month per passenger, as to be negligible. We believe, therefore, that

the increased fare herein approved will not be in conflict with the Emergency Price Control Act of 1942, as amended.

> Based upon the foregoing facts, we find that in order to meet increased operating expenses and the interest on its bonds, respondent is in need of additional revenue beyond that which may be expected from its present fares and divisions, and that a portion of such additional revenue can reasonably, and should, be obtained by increasing its downtown fare from 8 to 9 cents.

And also in the report of August 3, 1943, the Commission had in mind these contentions, when it said (R. 324):

> The Price Administrator in his reply does show what purports to be the amount by which respondent failed to earn its full interest requirements in the first 5 months of 1943. The "deficit" so shown is $75,798, and for the 12 months of the year would be $181,915, which according to this protestant, would leave available $1,203,635 for interest on the income bonds, equivalent to 4.34 percent on $27,711,000 of such bonds, or approximately the same interest rate, 4.42 percent, as we estimated would result from the amount so available under a 9-cent fare. Accordingly, it is argued that respondent is not now in need of any increase in its downtown fare. It is apparent, however, that the "deficit" and other results given for the 5-month period are not for the railroad

operations only, but also include the operation of respondent's terminal building, and therefore are of no value to us in determining whether or not there has been any important change in the revenue results from the railroad operations since the record on which the prior reports is based was closed.

The proposed alternative basis will not increase to any material extent the relative transportation burden of the local commuters on the downtown line beyond that anticipated by our authority as granted in the prior report. We there found that it would be unreasonable to expect the entire burden of the revenue increase to which respondent is entitled to be borne by the downtown local passengers, and that a substantial portion thereof, for the reasons therein stated, should be sought through increased divisions on the traffic interchanged with the Pennsylvania Railroad Company. In its petition respondent states that it will undertake to seek promptly such increased divisions on that traffic as shall be adequate.

As said by this Court in its decision of February 28, 1944, in No. 316, *The Hecht Company v. Bowles* (p. 8 of slip opinion): "The Administrator does not carry the sole burden of the war against inflation." How well the Commission has shared in this important task is clearly shown by its 57th Annual Report to Congress (dated November 1, 1943) where it compared conditions which prevailed during World War I and the two years

prior to November 1, 1943. At page 12 of this Annual Report, the Commission reported to Congress:

> We have endeavored to assist in carrying out the important policy outlined in this directive. In this connection a comparison of conditions which prevailed during World War I with those of the past 2 years is of interest.
>
> During the 4 years following the outbreak of World War I in 1914, there were three freight rate increases, one of 5 percent, a second of 15 percent, both limited to official territory but amounting, on a national basis, to 2.4 and 7.2 percent, respectively, and a third general increase intended to produce 25 percent but which because of specific increases allowed may be calculated at approximately 20 percent. The aggregate of these increases may be estimated at 31.7 percent. During the 4 years following the outbreak of World War II in 1939, only one general freight rate increase was authorized by this Commission (*Increased Rates, Fares, and Charges, 1942*, 248 I. C. C. 545, 612, March 2, 1942). This increase amounted to 6 percent except that it was limited to 3 percent on the basic or raw products of agriculture, animals and products, and the products of mines, except coal, coke, lignite, iron ore, and sinter. No increases in the rates on iron ore and sinter were permitted and the increases in coal, coke, and lignite ranged from 3 to 6

cents per ton. Because of the exceptions noted, we estimate the total amount of the increases allowed at 4.7 percent. This increase was subsequently suspended.

The railroad freight rate increases in the first 48 months of World War I and World War II compare with the increases in wholesale prices for the corresponding periods as follows:

	Freight rate increases	Wholesale prices, all commodities	Wholesale prices, excluding farm products and foods
World War I, August 1914–July 1918	[1] 31.7	96.1	92.4
World War II, September 1939–August 1943	[2] 4.7	37.1	21.5

[1] This figure assumes that the third rate increase in this period of 25 percent averaged about 20 percent. If 25 percent, the increase would be 37.5 percent.

[2] Suspended until Jan. 1, 1944, by decision of Apr. 6, 1943; later suspended until July 1, 1944.

In the face of the statements heretofore quoted from the reports of the Commission, pages 51–56 of this brief, we think the lower court was not justified in saying that the Commission "lightly brushed aside" the contentions of the Administrator (R. 199). The facts are directly to the contrary. It must be remembered that costs of labor and materials which this carrier has to pay have gone up and these increased costs have greatly added to its burdens. The Commission has no control over these increased costs, but only over its rates. Consequently, it is difficult to see how the

Commission could do otherwise than allow the increase. (*Vinson, et al.* v. *Washington Gas Light Co.*, decided March 27, 1944.)

III

The Increase Authorized by the Commission Was Supported by the Evidence

Although the lower court discussed only the two questions covered so far in this brief, we assume that the entire case is here for review (*United States* v. *Northern Pacific Ry. Co.*, 288 U. S. 490, at p. 494).

The evidence in this case followed largely the pattern of the evidence in *Hudson & Manhattan R. Co.* v. *United States*, sustained in 313 U. S. 98, against an attack on its sufficiency. It covered a wide variety of matters pertaining to this carrier. Some of the evidence has been referred to at pp. 16–19 of this brief. In order to keep our argument within reasonable compass, we are setting forth in Appendix B, pages 71–82, a summary of the evidence before the Commission, which we submit meets the "substantial evidence" rule, the record references all being to the unprinted original record filed with the clerk and stipulated as a part of the record in this case (R. 419).

One other matter should be referred to, and that is the question of interline divisions with the Pennsylvania Railroad. Much is made in their complaints and amended complaints by appellees of the admonitions contained in the Commission's

reports that the carrier might well look to the Pennsylvania Railroad for increased divisions. The Commission is the body which gave this admonition and the Commission is the body which is permitting this fare increase, so obviously it sees nothing inconsistent in its action. Nor is there. Until the question of reasonable fares is settled it is clear that the Hudson & Manhattan is hardly in a position to approach the Pennsylvania. In other words, it needs must have a stable basis before proceeding, and a stable basis would hardly exist until the court determines the validity of the fare order.

But there is testimony in the record dealing with this question. Witness Brown testified [12] (p. 1125) that there can be no increase in Pennsylvania divisions until the fare is settled. There is also testimony concerning Pennsylvania divisions and discussions at pages 1289–1290, 1298, 1309, and 1325 of the transcript. (See also Mr. Brown's testimony at pp. 1269–1273.) Mr. Bauman for the protestants had some discussion of this question at pages 1517–1518 of the transcript. At page 2074 Mr. Brown indicated they had preliminary conversations with the Pennsylvania concerning this question. At pages 2105–6, 2108–10, and 2111 appears also testimony of Brown concerning Pennsylvania divisions.

[12] The references here are to the original record, unprinted, lodged with the clerk as part of the record to which all parties might refer in brief and argument (R. 419).

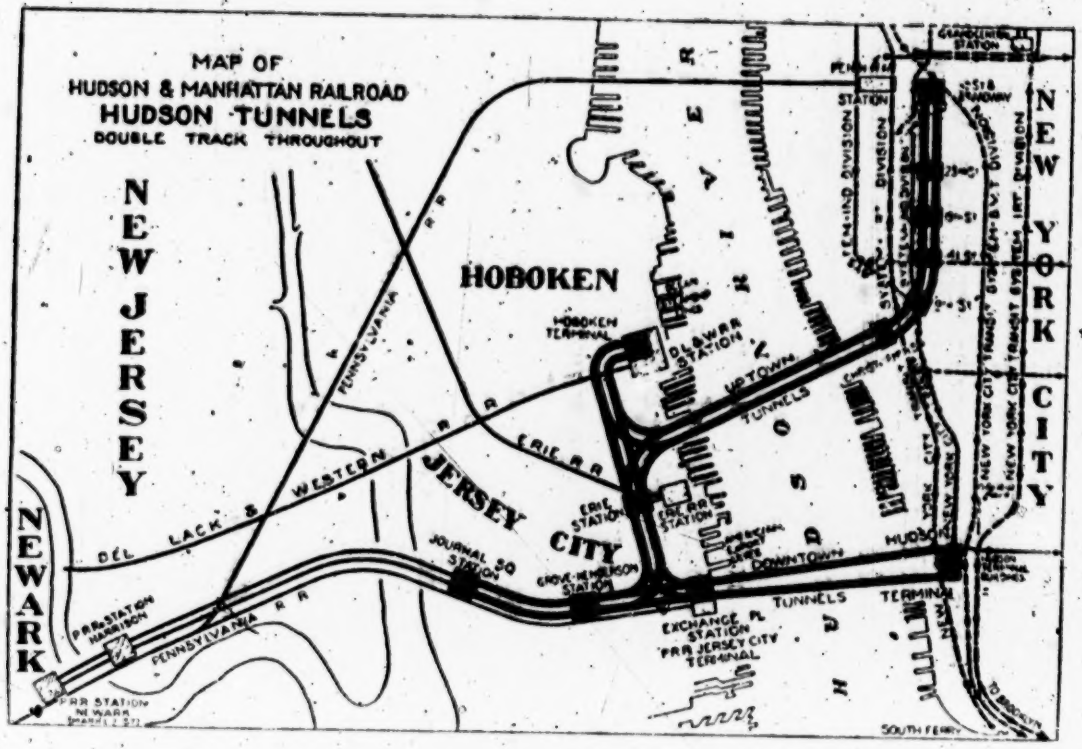
It would appear from the foregoing record references that the Commission knew just what it was doing and what it intended to do on this fare increase application.

In this respect the Commission in effect said to the Hudson & Manhattan: We have found what is the reasonable maximum downtown fare. We realize that the resulting revenue will not be enough to meet increased operating expenses plus all the interest on your bonds. If you feel inclined to press your revenue needs further, you should consider the advisability of increased divisions from passenger traffic interchanged with the Pennsylvania Railroad.

CONCLUSION

It is respectfully submitted that the decision of the lower court should be reversed and the Commission's orders sustained.

DANIEL W. KNOWLTON,
Chief Counsel,
E. M. REIDY,
Assistant Chief Counsel,
For Interstate Commerce Commission.


MAP OF
HUDSON & MANHATTAN RAILROAD
HUDSON TUNNELS
DOUBLE TRACK THROUGHOUT
NEW JERSEY
NEWARK
HOBOKEN
JERSEY CITY
NEW YORK CITY
HUDSON RIVER
HOBOKEN TERMINAL
DELAWARE STATION
UPTOWN TUNNELS
ERIE R R
ERIE STATION
DEL LACK & WESTERN R R
PENNSYLVANIA R R
JOURNAL SQ STATION
GROVE-NEWARK STATION
DOWNTOWN TUNNELS
EXCHANGE PL STATION
PRR JERSEY CITY TERMINAL
PRR STATION HARRISON
PRR STATION NEWARK
PENNSYLVANIA R R
CHRISTOPHER ST STATION
9TH STREET STATION
33RD STREET STATION
HUDSON TERMINAL
NEW YORK CITY TERMINAL
SOUTH FERRY
TO BROOKLYN

APPENDIX A

Pertinent provisions of Part I of the Interstate Commerce Act follow:

SEC. 1 (5) (a). All charges made for any service rendered or to be rendered in the transportation of passengers or property, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

(b) Nothing in this Act shall be construed to prevent any common carriers subject to this Act from entering into or operating under any contract with any telephone, telegraph, or cable company, for the exchange of their services.

SEC. 15 (1). That whenever, after full hearing, upon a complaint made as provided in section 13 of this part, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this part for the transportation of persons or property as defined in the first section of this part, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this part, is or will be unjust or unreasonable or un-

justly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this part, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

SEC. 15 (7). Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the law-

fulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge,

or classification, or in a rule, regulation, or practice, after the date this amendatory provision takes effect, the burden of proof shall be upon the carrier to show that the proposed change rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

SEC. 15a. (1) When used in this section the term "rates" means rates, fares, and charges, and all classifications, regulations, and practices relating thereto.

(2) In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management, to provide such service.

The Emergency Price Control Act of 1942, 56 Stat. 23:

Sec. 1 (a) (50 U. S. C. App., Supp. II, § 901 (a)):

It is hereby declared to be in the interest of the national defense and security and necessary to the effective prosecution of the present war, and the purposes of this Act are, to stabilize prices and to prevent speculative, unwarranted, and abnormal in-

increases in prices and rents; to eliminate and prevent profiteering, hoarding, manipulation, speculation, and other disruptive practices resulting from abnormal market conditions or scarcities caused by or contributing to the national emergency; to assure that defense appropriations are not dissipated by excessive prices; to protect persons with relatively fixed and limited incomes, consumers, wage earners, investors, and persons dependent on life insurance, annuities, and pensions, from undue impairment of their standard of living; to prevent hardships to persons engaged in business, to schools, universities, and other institutions, and to the Federal, State, and local governments, which would result from abnormal increases in prices; to assist in securing adequate production of commodities and facilities; to prevent a post emergency collapse of values; to stabilize agricultural prices in the manner provided in section 3; and to permit voluntary cooperation between the Government and producers, processors, and others to accomplish the aforesaid purposes. * * *

Sec. 302 (c) (50 U. S. C. App., Supp. III, § 942 (c)):

* * * *Provided*, That nothing in this Act shall be construed to authorize the regulation of (1) compensation paid by an employer to any of his employees, or (2) rates charged by any common carrier or other public utility * * *.

Act of October 2, 1942, c. 578, 56 Stat. 765:

That in order to aid in the effective prosecution of the war, the President is author-

ized and directed, on or before November 1, 1942, to issue a general order stabilizing prices, wages, and salaries, affecting the cost of living; and, except as otherwise provided in this Act, such stabilization shall so far as practicable be on the basis of the levels which existed on September 15, 1942. The President may, except as otherwise provided in this Act, thereafter provide for making adjustments with respect to prices, wages, and salaries, to the extent that he finds necessary to aid in the effective prosecution of the war or to correct gross inequities: *Provided*, That no common carrier or other public utility shall make any general increase in its rates or charges which were in effect on September 15, 1942, unless it first gives thirty days notice to the President, or such agency as he may designate, and consents to the timely intervention by such agency before the Federal, State, or municipal authority having jurisdiction to consider such increase.

Sec. 2:

The President may, from time to time, promulgate such regulations as may be necessary and proper to carry out any of the provisions of this Act; and may exercise any power or authority conferred upon him by this Act through such department, agency, or officer as he shall direct. The President may suspend the provisions of sections 3 (a) and 3 (c), and clause (1) of section 302 (c), of the Emergency Price Control Act of 1942 to the extent that such sections are inconsistent with the provisions of this Act, but he may not under the authority of this Act suspend any other law or part thereof.

* * * * *

Sec. 7:

* * * * *

(c) Nothing in this Act shall be construed to invalidate any provision of the Emergency Price Control Act of 1942 (except to the extent that such provisions are suspended under authority of section 2), or to invalidate any regulations, price schedule, or order issued or effective under such Act.

Executive Order No. 9250 (7 Fed. Reg. 7871):

By virtue of the authority vested in me by the Constitution and the Statutes, and particularly by the Act of October 2, 1942, entitled "An Act to Amend the Emergency Price Control Act of 1942, to aid in Preventing Inflation, and for Other Purposes," as President of the United States and Commander in Chief of the Army and Navy, and in order to control so far as possible the inflationary tendencies and the vast dislocations attendant thereon which threaten our military effort and our domestic economic structure, and for the more effective prosecution of the war, it is hereby ordered as follows:

Title I—Establishment of an office of economic stabilization:

* * * * *

4. The guiding policy of the Director and of all departments and agencies of the Government shall be to stabilize the cost of living in accordance with the Act of October 2, 1942; and it shall be the duty and responsibility of the Director and of all departments and agencies of the Government to cooperate in the execution of such administrative programs and in the de-

velopment of such legislative programs as may be necessary to that end. The administration of activities related to the national economic policy shall remain with the departments and agencies now responsible for such activities, but such administration shall conform to the directives on policy issued by the Director.

* * * * *

4. The Director shall be the agency to receive notice of any increase in the rates or charges of common carriers or other public utilities as provided in the aforesaid Act of October 2, 1942.

Executive Order No. 9328, par. 4 (8 Fed. Reg. 4681, 4682):

The attention of all agencies of the Federal Government, and of all State and municipal authorities, concerned with the rates of common carriers or other public utilities, is directed to the stabilization program of which this order is a part so that rate increases will be disapproved and rate reductions effected, consistently with the Act of October 2, 1942, and other applicable federal, state, or municipal law in order to keep down the cost of living and effectuate the purposes of the stabilization program.

APPENDIX B

At page 59 of the Commission's brief, we referred to the fact that we would set out in an appendix, evidence which in our judgment was sufficient to sustain the Commission's order. This we now do, directing attention to the fact that the record references are to the original record in typewritten form which has been filed with the clerk but, pursuant to stipulation (R. 419), not printed.

At pages 1022–1023 of the testimony, Witness Day showed the ferries that had been discontinued since the last hearing and the increase in the fares of others. At pages 1086–1087, Witness Van Gieson showed the drop in passengers, 1941 compared with 1937. At page 1097 he also testified concerning maintenance expenses on joint service equipment, that is, on equipment used in conjunction with the Pennsylvania Railroad.

Mr. Brown, Chairman of the Board of Directors of the Hudson & Manhattan and a former Postmaster General, testified at pages 1120–1122 as to why the Hudson & Manhattan did not accept the *Ex Parte No. 148* increase. He testified at page 1122 and also at page 1125 that there should be no difference in the uptown and downtown fares. Mr. Brown, at pages 1126–1127, referred to the congestion resulting from an attempt to insert 9 cents in the fare boxes. He admitted (page 1132) that passengers fell off after the fares had been increased to 8 cents on the downtown line

and at pages 1136–1137 and also at page 1139, Mr. Brown testified as to increases in labor costs, 1941 over 1937, and also as to increase in the company's taxes. At page 1139 Mr. Brown specified the additional revenues needed to meet bond interest. (See also his testimony at page 1261.) At pages 1141–1142 Mr. Brown testified concerning the expansion of traffic on the Hudson & Manhattan resulting from the war. (See also pp. 1144–1145.)

Witness Slater testified and at page 1152 showed that the net income for 1941 was below that for 1937. At page 1164 he testified that the fare increase caused a diversion of 16.5 percent. At page 1168 he showed the reduction in the number of uptown passengers and at page 1174 the increase in busses and passengers crossing the Hudson River. At page 1179 Mr. Slater testified concerning increased taxes and increased revenues to the carrier. At pages 1184–1185 he showed increases in revenues and increases in operating expenses, together with figures for the year 1942 on increase in traffic. It was his opinion (p. 1187) that improved economic conditions would not cause as much diversion in the traffic as the prior increase. (See also his testimony at pp. 1242–1243 concerning this subject.) At page 1194 he showed the amounts by which the 8-cent fare failed to meet bond interest. At pages 1248–1249 Mr. Slater gave his views concerning diversion under 9-cent and 8-cent fares.

Witness Brown was recalled and at pages 1262–1263 he again emphasized the increases in expenses and taxes, and at pages 1264–1265 the ne-

cessity for his company's setting up a war hazards fund. At pages 1266 and 1268–1269 he showed the increased revenues needed by his company. He also showed (p. 1274) that the stockholders get nothing until the accrued bond interest in arrears is paid off. At page 1277 Mr. Brown testified as to changed conditions favoring the Hudson & Manhattan, and at pages 1278–1279 he showed how conditions differ now (in 1942) from those of 1938. At page 1280 he testified as to the amounts needed to pay current bond interest; at page 1282 he stated that the higher standard of living now prevailing would cause less diversion, and also showed the increase in Hudson & Manhattan traffic due to the war.

Witness Bauman for the protestants, page 1363, testified as to increase in certain ferry fares, which now sell 25 for $1.00. At page 1391 he advocated 60 rides for $3.00 on the Hudson & Manhattan. At page 1393, Mr. Bauman showed Hudson & Manhattan gains from the 8-cent fare and at page 1397 he testified as to the increased expenses of the Hudson & Manhattan. At pages 1436–1437 Mr. Bauman testified as to the character of workers in Jersey City and at pages 1458–1460, 1462, 1466–1467, and 1472–1473, he made estimates concerning future prospects for 1943 traffic. At pages 1485–1486 Mr. Bauman testified as to the effects of the depression on the Hudson & Manhattan and at page 1522 concerning the increase in its business due to the war. At page 1551 he spoke concerning the diversionary effects of an increase. At page 1645 he testified that the war workers using the Hudson & Manhattan received

higher wages than the previous class of commuters, and at page 1647 he showed the increase of traffic on the Hudson & Manhattan due to war conditions. At page 1648 he estimated the traffic for 1943, and at pages 1652–1653 the number of passengers and revenues to be expected in 1943. He conceded (p. 1654) that increased revenue will not produce a profit on account of increased expenses. At page 1671 he testified concerning 1943 traffic prospects.

Witness Cassidy (for the protestants) testified at page 1743 concerning a decline in traffic between 1938 and 1941 and said it was due entirely to the fare increase to 8 cents. He conceded, page 1806, that the regular customers would purchase tokens. At pages 1808–1809, Witness Cassidy testified concerning defense workers traveling during peak hours and at page 1884 he estimated 96,000,000 passengers would travel on the Hudson & Manhattan. At pages 1921–1922, Witness Slater showed that the Hudson & Manhattan earned over $236,000 more under the 8-cent fare than it did under the 6-cent fare.

Witness Brown appeared at this reopened proceeding and at pages 2039–2048 he testified concerning the impossibility of collecting a 9-cent fare with the present fare collection boxes. At pages 2052–2053 Mr. Brown testified that under a 9-cent fare the railroad's earnings would be $385,000 additional, or more than $1,000 each day. He also testified, at pages 2053–2055, concerning the earnings of his company on the assumption that 90 percent of the passengers would purchase tokens. At page 2067, he estimated a percentage

increase of 15 percent, 1943 over 1941. Mr. Brown also showed (p. 2072) that he arrived at his estimate that 90 percent of his patrons would purchase tokens by discussing it with transportation men and from his own observation as to the character of the Hudson & Manhattan traffic. He stated (p. 2076) that the uptown line handles about 25 percent of what the downtown line does. At page 2133 Mr. Brown testified as to the added costs from the use of tokens. He stated at pages 2135–2136 and at page 2137 that they expected additional revenue of $395,000. He discussed the ability of the commuter using his line to spend a dollar for tokens (pp. 2161–2162).

It was shown that had the company taken the *Ex Parte No. 148* increase it would be $750,000 better off (p. 2212).

At page 2275, Mr. Van Gieson stated that the Hudson & Manhattan carries 225,000 passengers a day between all stations and, at page 2276, stated that over 50,000 passengers a day enter the Hudson Terminal for transportation to New Jersey and the same number in the opposite direction. They pass the boxes at the rate of three people per second (p. 2277). Mr. Van Gieson stated his conclusions as to why 11 tokens for $1.00 was necessary or a straight 10-cent fare (p. 2395).

Witness Kosh, for the O. P. A., testified that in 1929 and 1930, 85 percent of the people using busses in Cincinnati purchased tokens (p. 2438). This witness said he had prepared a table showing the 7 months condensed income statement for the Hudson & Manhattan predicated

on its own figures for the first 7 months of 1943, compared with the first 7 months of 1942 (p. 2446). The examiner ruled he would not receive it (p. 2447) because it was irrelevant under the previous rulings made by him. Witness Kosh would express no opinion on the percentage of token passengers, 11 for $1.00 (p. 2459).

In addition to this oral testimony, numerous exhibits were introduced and which were competent for the Commission to consider in reaching its conclusions. Among these exhibits were the following:

Exhibit 5–R, consisting of 6 sheets, showed the Hudson & Manhattan passengers carried by routes, 1919 to 1941, inclusive. Exhibit 25–R, cost of construction of the railroad's properties to December 31, 1941; Exhibit 26–R, summary of bonds outstanding in the hands of the public up to December 31, 1941, and a supplement bringing that information up to August 31, 1942. Exhibit 27–R shows materials and supplies on hand on December 31, 1941; Exhibit 28–R is a record of interest and dividend payments from 1938 to 1941, inclusive, and Exhibit 30–R shows the local fares on the Hudson & Manhattan 1938 to 1941, the fares on the joint rapid-transit electric train service from 1938 to 1941, and a summary of the passenger traffic and revenue for the four years, 1938 to 1941, inclusive. A supplement brought the information shown on Exhibit 30–R down to August 1, 1942. Exhibit 36–R shows passengers carried by classes of fares, by stations of origin, and passengers carried in and out of New York by different trunkline railroads compared with the

Hudson & Manhattan; this exhibit also segregates the income applicable to railroad operations between uptown and downtown services for the year 1941; it shows the costs of various forms of tickets over various railroad lines, and compares rail and bus fares. Exhibit 33–R shows headway between trains; Exhibit 34–R the maximum traffic periods and service on August 19, 1942, and Exhibits 37–R and 38–R show the same information for the downtown and uptown lines. Exhibit 86–R shows passenger traffic and car service for August 19, 1942. Exhibit 4–R showed Hudson & Manhattan distances between stations and 5–R was a chart showing passengers carried 1920–1942, inclusive. Exhibit A was a comparison of volume of traffic for the period from January 1, 1942, through June 20, 1942, with the corresponding period of 1941; Exhibit B constitutes a comparison of operating expenses, taxes, and car-miles, 1937 and 1941; Exhibit C shows for the period August 2 to August 9, 1942, inclusive, the number of military and naval passengers using the Hudson & Manhattan and the number of civilians accompanying them; Exhibit G showed the rate of return from railroad operations at specified traffic levels based on 8-cent fare downtown, and also the same information based on a 10-cent fare downtown and assuming a 12 percent diversion of traffic, while Exhibit H (introduced by Witness Brown) was a history of one-way and round trip fares between the Pennsylvania and the Hudson & Manhattan from 1911 to August 1942.

Exhibit F–87 (Bauman) was a comparison of passengers carried with passenger car miles

1927 and 1937 to 1941, inclusive; Exhibit F-88 showed the trend in passenger traffic on the Hudson & Manhattan from 1937 to 1942; Exhibit F-89 compared loss or gain in local traffic originated in New Jersey between 1937 and 1941; Exhibit 90 showed population figures for 1940 of Hudson county cities, while Exhibit 91 showed the trans-Hudson automobile traffic, 1938 to 1941, inclusive. Exhibit F-92 showed New Jersey bus companies, areas served by them and their local fares to the Central Railroad of New Jersey depot. Exhibits 94, 95, and 96 were about the same as Exhibit F-92, except applying to the ferries of the Erie Railroad, the Pennsylvania Railroad, and the Lackawanna, respectively. Exhibit F-93 was a comparison of distances between stations in Jersey City and in New York City, with passengers originated in the year 1941; Exhibit F-98 was a comparison of present ferry fares applicable in New York Harbor, while Exhibit 99 compared Hudson & Manhattan downtown local traffic with railroad ferry local passenger traffic, 1937 to 1941. Exhibit 100 showed the same information compared with railroad passengers carried by ferries for the years 1937 to 1941. Exhibit F-102 showed the commutation fares on the Pennsylvania Railroad, while No. 103 was a comparison of gain or loss in passengers to, from, or within New Jersey, 1937 versus 1939, by classes of traffic, with gain or loss of trans-Hudson traffic of the Erie, Lackawanna, Pennsylvania, and Jersey Central. Exhibit F-104 showed loss in local passengers originated in New Jersey, 1937 compared with 1939, by stations of origin, while No. 105 was an analysis of traffic and revenue for

a typical day in 1938 and 1942. Exhibit F–107 was a comparison of the carrier's railway operating expenses and taxes, 1937 to 1941; Exhibit F–108 was a comparison of additional passenger revenue (at 2¢ per passenger) paid by downtown passengers with increases in operating expenses and taxes incurred by the Hudson & Manhattan for the years 1938 to 1941, using 1937 as a base. Exhibit F–109 compared increases in operating expenses and taxes incurred by the Hudson & Manhattan for the years 1938 to 1941, with additional revenue, if any, received from interline traffic, using the year 1937 as a base; Exhibit F–110 was an estimate of revenue gains to the Hudson & Manhattan and cost to passengers on proposed 10-cent fare, predicated on additional diversion of downtown traffic as a result of such increase, using 1941 as the base. Exhibit 111 showed revenue traffic and transportation statistics, downtown and uptown branches; Exhibit 112 compared downtown fares and Hudson & Manhattan proportion of joint fares, 1919 to 1942; Exhibit F–113 was a comparison of revenues received by the Hudson & Manhattan for transporting passengers ex-trunk line railroads and Exhibit 114 compared revenues, per mile, if ex-Pennsylvania R. R. earnings of the Hudson & Manhattan were increased 2 cents, compared with earnings it received on ex-Erie and ex-Lackawanna passenger traffic. Exhibit 116 compares revenue effect of increased fare upon the joint traffic of the Hudson & Manhattan and Pennsylvania R. R. between Newark and New York; Exhibit 117 was a Hudson & Manhattan statement of net income from all operations for years ending

December 31, 1941, and June 30, 1942. Exhibit 118 showed the Hudson & Manhattan income account for years ending June 30, 1941, December 31, 1941, and June 30, 1942, while Exhibit 119 was a comparative income statement of that carrier, for the period June 1938 to December 31, 1941, in cents per revenue car mile. Exhibit No. 120 showed the relationship of revenue requirements for interest by the Hudson & Manhattan with its operating expenses and taxes, in cents per car mile, for the calendar year 1940. Exhibit 122 compared gross income and interest requirements of rapid transit lines, in cents per revenue car mile, for the year ending December 31, 1940. Exhibit 123 was a comparison of passenger revenue per mile and operating ratio of the Hudson & Manhattan with rapid transit surface lines in New York City, for the year 1940. Exhibit 124 was a comparison of operating revenues and operating ratio of the Hudson & Manhattan with rapid transit surface line, including interstate operations, per car or per bus mile for the year 1940, while Exhibit No. 125 compared operating revenue per car mile and operating ratio, Hudson & Manhattan compared with rapid transit sub-surface lines in New York City. Exhibit 126 was a statement showing total increase in revenue, 1942 over 1941 (by months) under present fares and divisions. Exhibit 127 was a statement showing increase in revenue, 1942 over 1941, by months, under present fares on local traffic and an assumed increase of 2½ cents in revenue on interline traffic. Exhibit 128 showed 1940 to 1942 passenger increase or decrease by months, Hudson & Manhattan, also monthly increase 1942

over 1941; Exhibit 129 compared passenger revenues in United States and by Districts, July 1941 and July 1942.

Exhibit F–136, Witness Cassidy, was a traffic check at the Jersey Central Ferry on September 9, 1942.

Hudson & Manhattan Exhibit Q was a copy of a bill submitted by that carrier to the Pennsylvania Railroad showing balance due for July 1942, with respect to divisions and agreed charge for passengers transported in joint service and interchanged between the companies. Its Exhibit R showed trans-Hudson passengers handled by ferries of the railroads at New York segregated by railroad and local passengers for the years 1935 to 1941, inclusive. The carrier's Exhibit S was an analysis and restatement of protestant's Exhibit F–105, gains and losses peak and nonpeak hour traffic 1938 and 1942, based on a typical day in February 1938 and August 1942. Carrier Exhibit U was an analysis of passenger traffic for the 8-months period ending August 31, 1937, and 1942. The Commission also had before it as Exhibit 142 the report of the Committee on Fare Structure of the American Transit Corporation, as well as Exhibit 147, which was a statement showing the number of interstate local passengers carried during the year ending December 31, 1942, divided as between downtown and uptown passengers, the revenue therefrom on the basis of the present fares, the revenue on basis of proposed fares of 10-cents cash or 11 tokens for $1.00, with 10 percent of the passengers paying cash and 90 percent buying tokens, and showing also the increase in

downtown revenues and decrease in uptown revenues. Exhibit 148 showed the same information as No. 147, except it was for the year ending August 31, 1943, while Exhibit 149 contained the same information as Exhibit 147, except that it covered the period of 8 months ending August 31, 1943. Exhibit 150 showed the same information as No. 147, adjusted to a yearly basis. Exhibit 151 showed the rate of overloading of the coin boxes, while Exhibit No. 154 was a spot check of token use, showing result of such study.

We have gone into the evidence in some detail to show the scope of it before the Commission. Surely there was, as this Court has said, out of this mass of evidence enough for a body of experts to name a rate.

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